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IN THE

Supreme Court of the United States

October Term, 1966

No. 807

KENNETH BURKARD and MORGAN SIEFERT,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
30 East 42nd Street,
New York, N. Y. 10017,

SAMUEL A. NEUBURGER,
30 Vesey Street,
New York, N. Y. 10007,

Attorneys for Appellants.

Of Counsel:

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
HENRY WINESTINE.

November 25, 1966.

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IN THE

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No.

KENNETH BURKARD and MORGAN SIEFERT,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Kenneth Burkard and Morgan Siefert, having appealed from a judgment of the Court of Appeals of the State of New York affirming an order of the Appellate Division of the Supreme Court of the State of New York dismissing their appeals from a judgment of conviction for conspiracy to violate Section 244, New York Penal Law, submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

Opinions Below

The opinion of the Court of Appeals is reported at 18 N. Y. 2d 148, 272 N. Y. S. 2d 357, 219 N. E. 2d 183 and is appended hereto as Appendix A (page 12, *infra*). The opinion of the Appellate Division of the Supreme Court is

reported at 25 A. D. 2d 182, 268 N. Y. S. 2d 94, and is appended hereto as Appendix B (page 13, *infra*). The unreported opinion of the trial court denying appellant's motion to suppress eavesdropped evidence is appended hereto as Appendix C (page 19, *infra*).

Jurisdiction

Appellants, and others, were indicted on June 12, 1964 (in a superseding indictment) on two counts. The first count charged a conspiracy to commit the crimes of assault, coercion and violation of N. Y. Penal Law § 555. The second count charged a conspiracy to commit the crimes of injury to property and violation of N. Y. Penal Law § 1423, subdivision 6.

The appellants moved, prior to trial, pursuant to New York Code of Criminal Procedure (hereinafter "C.Cr.Proc.") § 813-c, to suppress the fruits of electronic eavesdropping which had been effected under judicial orders as provided in C.Cr.Proc. § 813-a. The motion was denied, and was made again at the commencement of the trial. After a hearing, the motion was again denied, and appellants, relying upon the procedure provided in C.Cr.Proc. § 813-c, pleaded guilty to the crime of conspiracy to commit the crime of assault in the third degree, a misdemeanor, reserving their right to appeal. Appellant Burkard was sentenced to a six months term and appellant Siefert a three month term in the New York City Penitentiary. Both were released on parole pending appeal.

The Appellate Division of the Supreme Court on March 29, 1966 dismissed the appeal after submission on the merits and the Court of Appeals on July 7, 1966 affirmed, suggesting that appellants could withdraw their guilty pleas and proceed to trial. Notice of appeal to this Court from the said judgment of the Court of Appeals was filed on October 3, 1966 in the New York Supreme Court, New York County.

Jurisdiction of this appeal is conferred by 28 U.S.C. § 1257(2). The following cases sustain the Court's jurisdiction: *Hoyt* v. *Florida*, 368 U.S. 57; *McGowan* v. *Maryland*, 366 U.S. 420.

Statutes Involved

The principal statutes involved are §§ 813-a and 813-c of the New York Code of Criminal Procedure, which provide:

> "§ 813-a. Ex parte order for eavesdropping
>
> An ex parte order for eavesdropping as defined in subdivision one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as

authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner, be retained by the judge or justice denying the same."

"§ 813-c. The motion in general

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

Questions Presented

1. Did electronic eavesdropping, accomplished by physical trespass upon premises occupied by some of defendants, done pursuant to *ex parte* court orders as authorized by New York Penal Law section 813-a, constitute an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution and compulsory self-incrimination prohibited by the Fifth and Fourteenth Amendments to the United States Constitution?

2. Were the court orders which authorized such eavesdropping unreasonably broad, and were they based upon sufficient showing of probable cause, under the standards required by the Fourth and Fourteenth Amendments to the United States Constitution?

3. Did such eavesdropping violate defendants' rights guaranteed by the First and Fourteenth Amendments to the United States Constitution where it was committed in premises occupied by a labor union during an important representation election campaign?

Statement of the Case

This prosecution arose out of a contest between two labor organizations for the right to represent certain employees of the New York Telephone Company. The employees had been represented by Local 1101 Communications Workers of America (hereinafter called "C.W.A."). In 1964 the International Brotherhood of Teamsters (hereafter called "the Teamsters") petitioned the National Labor Relations Board for an election, and a vigorous campaign ensued. On December 30, 1964, six weeks before the scheduled election, Local 1101, of which appellants were members and Henry Habel, whose appeal is being separately taken, was president, voted to disaffiliate from C.W.A. and to affiliate with the Teamsters. Three weeks later, appellants were indicted, with a great deal of resultant adverse publicity. The election was held February 14, 1965. The Teamsters lost by a vote of about 11,000 to 9,000.

At the commencement of the trial a hearing was held on appellants' motion to suppress eavesdropped evidence. The eavesdropping had been conducted pursuant to six *ex parte* orders issued pursuant to § 813-a C.Cr. Proc. Twenty-three reels of tape were offered in evidence.

The first eavesdropping order was issued on the basis of the affidavits of two assistant district attorneys, Andreoli and Scotti. The Andreoli affidavit stated that "This office has received information from a confidential informer" that appellant Burkard paid $100 to have a member of the rival union beaten up, that Burkard indicated to the informer that future assaults were planned and a conference would be held that evening, and on the same day he was observed to enter the C.W.A. office with five men (A263-A264).*

Mr. Andreoli's affidavit concluded that there was reasonable ground to believe

> "... that evidence of crime may be obtained by overhearing and recording the conversations, communications and discussions taking place between persons present in the office of the Communications Workers of America ..." (A264)

Mr. Scotti's affidavit stated that he had read Mr. Andreoli's and on the facts stated therein, it was his opinion

> "... that evidence of crime may be obtained by overhearing and recording conversations, communications and discussions taking place in the ... office."

The order of Justice Sarafite authorized the installation of equipment

> "... to overhear and record ... any and all conversations, communications and discussions that may take place in the office of the Communications Workers of America ..."

and was made effective until September 2, 1963 (A261-A262).

An extension of the order was procured based on almost identical affidavits which included, however, reference to

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* Page references are to the printed record in the New York Court of Appeals which constitutes the record on this appeal.

facts obtained in an intercepted conversation (A268-274). A further extension was similarly procured (A275-281).

While the eavesdropping was in effect at the C.W.A. office, a similar application was made to eavesdrop at the Teamsters' office (A282-A288) and was later extended (A289-A294).

Another order was issued for eavesdropping in rooms at the hotel in which the C.W.A. office was located, based upon conversation overheard at the C.W.A. office (A295-A301).

Common to each application was the following: (1) In every case the express purpose was to secure "evidence of a crime". (2) In every case the affidavits sought and the orders issued granted authority to eavesdrop and record "any and all conversations, communications and discussions" at the various premises. In no case was there a designation of any persons whose conversations were to be overhead, or a description of the conversations. (3) The initial applications were based upon facts supplied by a confidential informer with no supporting facts as to the informer's reliability or trustworthiness. Extension orders were based upon the same facts plus the information obtained from earlier eavesdropping, but there was no allegation that the deponents had personally heard recordings of such conversations.

The eavesdropping at the C.W.A. office was authorized by the three orders for a consecutive period of five months and 25 days. At the Teamsters' office eavesdropping was authorized for two separate two month periods. § 813-a, by its terms, permits eavesdropping orders of up to two months duration.

The opinion of the trial judge denying the motion to suppress recites in detail a number of facts relating to the identity of the informer and the information he gave to the

district attorney. None of those facts were presented to the judges who issued the eavesdropping orders, nor do they appear anywhere in the record.

The Questions are Substantial

The New York eavesdropping statute and the orders issued pursuant to it in this case offend the fundamental principles of the Fourth Amendment, applicable to the states by virtue of the Fourteenth Amendment. *Ker* v. *California*, 374 U.S. 23; *Mapp* v. *Ohio*, 367 U.S. 643.

This case, in a somewhat different posture, raises the same issues as are presented in *Berger* v. *New York*, No. 615, and related issues to those in *Cohen* v. *New York*, No. 614 (involving wiretapping pursuant to § 813-a). This case, *Berger* and *Cohen* were argued in the New York Court of Appeals at the same time and decided on the same day.

Eavesdropping effected by a physical intrusion is a search and seizure within the Fourth Amendment. *Silverman* v. *United States*, 365 U.S. 505; *Clinton* v. *Virginia*, 377 U.S. 158. Therefore evidence of eavesdropping is inadmissible at a criminal trial if the Fourth Amendment standards are not met.

1. The eavesdropping orders were not based upon probable cause. The supporting affidavits on the initial applications refer simply to information obtained from a "confidential informer", with nothing more. Despite the repeated warnings from this Court that such information will not support a warrant, *e.g.*, *Aguilar* v. *Texas*, 378 U.S. 108, the New York court here accepted the prosecutors' conclusory affidavits. The affidavits in this case do not even contain the token statement that the informant was believed to be reliable. In denying the motion to suppress the trial court relied upon information never presented to

the judge who issued the orders, not offered at the suppression hearing, and never made available to appellants.

The renewal orders, being based upon information obtained in eavesdropping pursuant to the original orders, have the further defect of being based upon illegally obtained evidence. *Silverman* v. *United States, supra; Wong Sun* v. *United States,* 371 U.S. 471; *Silverthorne Lumber Co., Inc.* v. *United States,* 251 U.S. 385.

2. The eavesdropping orders in this case lacked the particularity required by the Fourth Amendment. By authorizing the overhearing and recording of "any and all conversations" at the designated premises for periods of up to six months, those orders were general searches which the Fourth Amendment was designed to prevent. Conceivably an eavesdropping order could be limited to a single conversation between named individuals on a specified date.[1] Short of that any eavesdropping order violates the limitations enunciated in *Stanford* v. *Texas,* 379 U.S. 476 and *Marron* v. *United States,* 275 U.S. 192.

3. The New York statute expressly authorizes eavesdropping to obtain "evidence of a crime" and it was for this avowed purpose that the subject orders were issued. But mere evidence may not be the subject of a search. *Harris* v. *United States,* 331 U.S. 145, 154; *Gouled* v. *United States,* 255 U.S. 298; *United States* v. *Lefkowitz,* 285 U.S. 452; *Hayden* v. *Warden,* 363 F. 2d 647, cert. granted No. 480, November 8, 1966.

4. Appellants' privilege against self-incrimination was violated by the eavesdropping. The recorded conversations, when placed in evidence, are in fact confessions involuntarily extracted. As the supporting affidavit on the first order unequivocally indicates (A263), appellant Burkard,

[1] Whether such an order could be executed seems doubtful, as it would be necessary to monitor, and probably record, all other communications in the premises.

if not the other appellants, was already the subject of investigation as a prospective defendant. Confessions are involuntary when "the methods used to extract them offend an underlying principle in the enforcement of our criminal law." *Rogers* v. *Richmond,* 365 U.S. 534, 541.

In *Massiah* v. *United States,* 377 U.S. 201, a conviction based on a confession made, unknowingly, to a government agent was reversed. There the confession occurred after indictment, and was made to a confederate who was cooperating with the prosecution. Here the confession was made to a hidden microphone. There can be no question here that the accused assumed the risk of a defecting accomplice, which troubled the minority in *Massiah.* And it is difficult to see how an involuntary confession procured prior to indictment is less prejudicial than one extracted after indictment.

Most recently, in *Miranda* v. *Arizona,* 384 U.S. 436, the Court dealt with the psychologically coercive effect of sophisticated police questioning of persons in their custody. Where a confession can be procured surreptitiously the police are happily free of *Miranda* problems. It is far simpler to bug a suspect's house than to interrogate him. It may take six months, but with patience, and complaisant courts, a confession will ultimately be obtained.

The highest court of the State of New York has interpreted § 813-a to permit general searches and compulsory self-incrimination without any showing of probable cause. As so interpreted, the statute clearly violates the Fourteenth Amendment.

5. The fact that two of the premises where eavesdropping occurred were the offices of labor unions, and that an important organizing campaign was in progress, renders the statute invalid on First Amendment grounds as well. The interception of "any and all conversations" in union offices for periods of four and six months respectively is

an intrusion upon the conduct of union affairs which interferes drastically with the rights to free speech and assembly vitally important to a labor organization. Thus, in *Local 309, United Furniture Workers of America* v. *Gates*, 75 F.Supp. 620, a union sought to enjoin police from attending its meetings. The court recognized the inhibiting effect of the police presence on First Amendment rights and granted the injunction.

In *N.A.A.C.P.* v. *Button*, 371 U. S. 415, 430 the Court noted the First Amendment protection which cloaks certain group activity. "We have deemed privileged, under certain circumstances, the efforts of a union to organize workers. *Thomas* v. *Collins* [323 U. S. 516]." The dissenting opinion of Mr. Justice Harlan, speaking for himself and Justices Clark and Stewart, was in full agreement with the proposition. 371 U. S. at 453-454.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
30 East 42nd Street,
New York, N. Y. 10017,

SAMUEL A. NEUBURGER,
30 Vesey Street,
New York, N. Y. 10007,

Attorneys for Appellants.

Of Counsel:
VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
HENRY WINESTINE.

November 25, 1966.

APPENDIX A

Opinion of the New York Court of Appeals

Per Curiam:

To pursue the special kind of appeal allowed "notwithstanding" a plea of guilty by the third paragraph of section 813-c of the Code of Criminal Procedure, conditions prescribed by that section must be met.

This kind of an appeal is authorized when taken from the denial of a motion for the return or suppression of property, papers or things "unlawfully obtained" which may be used in evidence in a criminal proceeding against the moving party.

Recordings of conversations made pursuant to judicial orders authorizing eavesdropping under section 813-a of the Code of Criminal Procedure, are not such property "unlawfully obtained" and a party aggrieved by a denial of a motion addressed to such recordings is left to appeal under the general avenues open in criminal cases. On the concession of the district attorney, appellants may, if they are so advised, withdraw their pleas of guilty.

The dismissal of the appeal by the Appellate Division was a final determination affecting a substantial right and the appeal to this court was properl allowed and is considered on the merits (Code Crimin. Pro., § 519 [5]; *People* v. *Pitts*, 6 N. Y. 2d 288; *People* v. *Pride*, 3 N. Y. 2d 545).

The orders should be affirmed.

APPENDIX B

Opinion of the Appellate Division of the Supreme Court

Per Curiam:

After the trial court denied a motion by defendants to suppress evidence of conversations obtained pursuant to eavesdropping orders issued under section 813-a of the Code of Criminal Procedure, each defendant, with the permission of the court, withdrew his plea of not guilty and pleaded guilty to the crime of conspiracy to commit the crime of assault in the third degree, a misdemeanor, under the first count of the indictment, the plea to cover the entire indictment. Following these pleas, judgments of conviction were entered on July 23, 1965, on which date an order was also entered implementing the previous denial of the motion to suppress. The People urge that the appeals taken from these dispositions should be dismissed on the ground that in the absence of a permissive statute a plea of guilty "poses no question for review" (*People* v. *Mason*, 307 N. Y. 570, 575). Defendants submit that such a statute is found in section 813-c of the Code of Criminal Procedure.

The type of motion to which section 813-c applies, and the denial of which "may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty," is a motion for the return of "property, papers or things" obtained by an unlawful search and seizure, or for the suppression of their use as evidence. Eavesdropped conversations are not within the literal scope of section 813-c (*People* v. *Laverne*, 14 N. Y. 2d 304, 309-310). While it is argued, not without some force, that the section is sufficiently elastic to allow suppression of tape recordings procured as a consequence of an initial trespass, we may not overlook that title II-A of the Code of Criminal Procedure deals expressly and exclusively with eavesdropping (which

by definition includes the recording of a conversation by means of instrument [Penal Law, § 738]); that the suppression procedure provided by title II-B, of which section 813-c is a part, has no parallel in title II-A; and, more immediately pertinent, that the Legislature chose to withhold from the latter title any authority to entertain appeals of the instant character. It is concluded, accordingly, that the appeals should be dismissed.

The record indicates that the pleas of guilty were influenced by defendants' belief that appeals would lie to test the legality of the eavesdropping, and defendants informed the court of their intention to appeal at the time their pleas were offered. The People's brief acknowledges that "where, as here, the defendants' misconceptions were announced at the time of pleading, and were not corrected by the prosecutor or court," withdrawal of a plea of guilty is warranted in the interest of justice.

The appeals should be dismissed. Of course, defendants may move to withdraw their guilty pleas in the court below, presumably with the consent of the People, as indicated in their brief.

All concur.

APPENDIX C

Opinion of Trial Court Denying Motion to Suppress

SCHWEITZER, J.:

This is a motion to suppress evidence seized pursuant to eavesdropping orders issued under section 813-a of the Code of Criminal Procedure. The facts show that one John Howard informed the District Attorney's Office of New York County that Kenneth Burkhard paid him $100 to have a member of the Communications Workers Union beaten up. Burkhard, he explained, was acting on behalf of the International Brotherhood of Teamsters (hereinafter referred to as the Teamsters) in an effort to supplant the Communications Workers of America (hereinafter referred to as the C.W.A.) as bargaining agent for the New York Telephone Company. On June 20, 1963 Burkhard discussed with Howard "contracts" for assaults upon people opposed to the Teamsters, but said he would have to confer with his associate that evening to determine steps to be taken in the future. Later that day, Burkhard and five others were observed entering the office of the C.W.A., Local 1101, located on the mezzanine floor of the Hotel Forrest, 224 West 49th Street, New York City. The statements of John Howard were verified for accuracy and reliability by recording Howard's conversations with the defendant Burkhard with the consent of Howard.

In order to investigate further possible violations of Sections 850, 380, and 240 of the Penal Law, Assistant District Attorneys Peter Andreoli and Alfred J. Scotti swore to the aforementioned facts in affidavits dated July 3, 1963, and petitioned the Honorable Joseph A. Sarafite, a Justice of the Supreme Court, to issue an order referring to or directing the overhearing of conversations taking place at the above-mentioned offices. That order was signed on July 2, 1963 and made effective to and including

September 2, 1963. A renewal of that order was signed by the Honorable Abraham Gellinoff on August 30, 1963, Justice Sarafite being in Europe at that time, and it was made effective to and including October 29, 1963. Finally, a similar renewal order pertaining to the same premises was signed by the Honorable John A. Mullen on October 29, 1963, Justice Sarafite being assigned in another county and not being available. This order was effective to and including December 28, 1963. A copy of the original order and affidavit was attached to each renewal order as well as affidavits which pointed out what further facts had been uncovered in the course of investigation which evidenced a conspiracy.

The eavesdropping device was installed in the C.W.A. office of Local 1101 pursuant to court order without the consent of the defendants or of anyone else. On August 23, 1963, a conversation between Habel and another union member was intercepted. Habel declared that he expected to acquire a .38 calibre gun, that he had no permit to carry such a gun, and that he had no intention of applying for such a permit. They disclosed that they intended to shoot a person opposed to their union activities, not kill him, but cripple him in both legs.

On September 9, 1963, Burkhard requested the informant, Howard, to arrange to beat up another member of the C.W.A. sometime in the future. On September 10, 1963, Burkhard met with William Olsen and William Genoese who are employed in the Communications Division of the Teamsters, and the following day, advised Howard that there had been a change; a more important figure was to be beaten up in the next few days; the plan was to incapacitate him for two to three months. Police information disclosed that Olsen and Genoese occupied room 437, 150 Fifth Avenue, New York City, Communications Division of the International Brotherhood of Teamsters.

Appendix C

Assistant District Attorneys Andreoli and Scotti set forth these facts (together with the facts contained in their affidavits of July 3, 1963) in affidavits dated September 12, 1963, on the basis of which the Honorable Justice Sarafite signed an order directing the overhearing of conversations at these premises. The order was extended to and including November 11, 1963. Evidence obtained pursuant to this order disclosed that Habel had contacted Genoese and the two were conspiring together to frighten those opposed to the Teamsters. On the basis of this fact and the original affidavits and orders of September 12, 1963, a renewal of this order was signed by the Honorable John Mullen on December 20, 1963 and made effective through February 19, 1964.

Information received from John Howard and evidence obtained pursuant to court orders all pointed to the fact that Habel and Burkhard had agreed to use physical force to create a new union in place of the C.W.A. or to turn control of the union over to the Teamsters. In furtherance of their plan, Habel had set up a "secret" office in rooms 612-614 Hotel Forrest registered in the name of Walker. On November 3, 1963, in a conversation recorded pursuant to court order, Burkhard called room 612. Habel answered, identifying himself as Walker, and Burkhard responded, "I'll be right up." On the basis of these facts set forth in the affidavits of Assistant District Attorneys Andreoli and Scotti, Justice Sarafite signed an overhearing order for rooms 612-614 on November 4, 1963. The order was made effective through and including January 4, 1964.

As a result of the eavesdropping conducted pursuant to these court orders, the conspirators who were directing the actions of the defendant Burkhard were identified and their conspiratorial conversations were overheard, and the assaults which were paid for were in fact prevented. It is to be noted that conversations pertaining to union matters and social relations were not recorded.

Appendix C

The defendants were charged with two counts of conspiracy. The first charged them with having conspired with each other and with others to commit the crimes of assault, coercion, and violations of Section 555 of the Penal Law, during the period from April, 1963 to January 8, 1964. In twenty-five overt acts it is alleged that eight named persons were to be beaten as well as others, that money was paid for this purpose and that a threatening telephone call was made. The second count charged a conspiracy during this same period to commit crimes of injury to property and to interfere with telephone lines. There are nine overt acts alleged.

The case came to trial before this Court, and after introducing the aforementioned orders and affidavits as well as reels of tape recorded pursuant thereto, a motion to suppress the evidence was heard and denied. Whereupon, on March 28, 1965 the defendants pleaded guilty to a lesser charge of conspiracy to commit the crime of assault in the third degree, a misdemeanor.

On the facts as set forth, this Court is satisfied that the information in the possession of the District Attorney's office was sufficient to form probable cause for the issuance of the eavesdropping order in conformity with the requirements of Section 813-a of the Criminal Code, and further, that the information obtained as a result of the first order was sufficient under the requirements of the statute to authorize the further issuance of additional orders. Indeed, each affidavit is itself sufficient on its face to procure a warrant for eavesdropping. I further find that Section 813-a conforms to the constitutional requirements for a warrant.

The motion to suppress is therefore denied.

APPENDIX D

Judgment of the Court of Appeals of the State of New York

STATE OF NEW YORK, SS:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 7th day of July in the year of our Lord one thousand nine hundred and sixty-six, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

REMITTITUR July 7, 1966.

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1. No. 233. 66

The People &c.,

Respondent,

vs.

Henry Habel, & ors.,

Appellants,

and

Wililam Griffin,

Defendant.

BE IT REMEMBERED, That on the 14th day of May in the year of our Lord one thousand nine hundred and sixty-six,

Henry Habel, & ors., the appellants in this cause, came here unto the Court of Appeals, by Mayer, Weiner & Mayer, & ors., their attorneys, and filed in the said Court Notices of Appeal and return thereto from the orders of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent —in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Vincent F. Fuller, of counsel for the appellants Habel, McGovern and Rodriguez, and by Mr. Victor Rabinowitz, of counsel for the appellants Seifert and Burkhard, and by Mr. Michael Juviler, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the orders of the Appellate Division of the Supreme Court appealed from herein be and the same hereby are affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said orders affirmed, as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form

of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

COURT OF APPEALS, CLERK'S OFFICE,

Albany, July 7, 1966.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Seal)

RAYMOND J. CANNON
Clerk.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No.

HENRY HABEL, ARTHUR MCGOVERN and JULIO RODRIGUEZ, *Appellants*

v.

THE PEOPLE OF THE STATE OF NEW YORK, *Appellee*

Appeal From the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Court of Appeals of the State of New York, entered on July 7, 1966, affirming the appellants' conviction under Section 244, Penal Law; and submit this statement to show that the Supreme Court of the United States has jurisdiction on appeal and that substantial questions are hereby presented.

OPINIONS BELOW

The opinion of the trial justice in Supreme Court, New York County, is not reported. The opinion of the New York Supreme Court, Appellate Division, First Department, is reported in 25 App. Div. 2d 182, 268 N.Y.S. 2d 94 (1966). The opinion of the New York Court of Appeals is reported in 18 N.Y. 2d 148, 219 N.E. 2d 183 (1966). Copies of each opinion are found in the appendix hereto.

JURISDICTION

These appellants, and others, were indicted by a grand jury in Supreme Court, New York County, on two counts of conspiring to commit the crimes of assault, coercion and violations of Section 555, Penal Law (Count 1), and the crimes of injury to property and violations of Section 1423, subdivision 6, Penal Law (Count 2), on June 12, 1964. All defendants moved, pursuant to Section 813-c, Code of Criminal Procedure, and the Fourth Amendment to the United States Constitution, to suppress recordings of conversations made on private property pursuant to judicial orders authorizing such eavesdropping under Section 813-a, Code of Criminal Procedure. Upon denial of the motions by the trial court, the appellants pleaded guilty, on March 23, 1965, to violating Section 244, subdivision 1, Penal Law (assault in the third degree), the pleas being entered for the purpose of taking an appeal to challenge the constitutionality of such evidence, this procedure being authorized by Section 813-c, Code of Criminal Procedure.

The conviction was affirmed by the New York Supreme Court, Appellate Division, First Department,

on March 29, 1966, the Appellate Division holding that the statutory procedure authorizing a pre-trial motion to suppress and an appeal from a guilty plea following denial thereof did not apply to evidence seized pursuant to judicial orders authorizing eavesdropping. That court, following a suggestion by the District Attorney, authorized the withdrawal of the guilty pleas and a new trial at which appropriate objections could be made. Leave to appeal to the Court of Appeals was granted on April 21, 1966, and that Court, on July 7, 1966, affirmed the Appellate Division decision, holding that "recordings of conversations made pursuant to judicial orders authorizing eavesdropping under section 813-a of the Code of Criminal Procedure, are not such property 'unlawfully obtained' ". Notice of Appeal to this Court was filed on October 3, 1966. The jurisdiction of this Court to review the decision is conferred by 28 U.S.C. § 1257 (2) and 28 U.S.C. § 2104.[1]

QUESTIONS PRESENTED

1. Whether orders issued pursuant to Section 813-a, Code of Criminal Procedure, may constitutionally, in the face of the Fourth and Fourteenth Amendments to the United States Constitution, authorize eavesdropping accompanied by physical trespass, so as to insu-

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[1] This case is similar to the case of *Ralph Berger* v. *The People of the State of New York*, No. 615, in which a petition for certiorari was filed on September 30, 1966. The cases were argued at the same time, both before the New York Supreme Court, Appellate Division, First Department, and before the New York Court of Appeals, and decided simultaneously in both courts. They differ only in the procedural posture in which the issues were presented to those Courts and to this Court.

late evidence thereby obtained against a motion to suppress.

2. Assuming the above question to be decided affirmatively, whether such orders are constitutional in the face of the Fourth and Fourteenth Amendments to the United States Constitution, when they are issued on affidavits based upon information from an informant of unstated reliability, when they fail to describe with particularity the statements to be overheard and recorded and when they authorize a general search for evidence.

STATUTES INVOLVED

AMENDMENT IV, CONSTITUTION OF THE UNITED STATES:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

AMENDMENT XIV, SECTION ONE, CONSTITUTION OF THE UNITED STATES:

> "All persons born or naturalized in the United States and subjects to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any persons of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

SECTION 813, CODE OF CRIMINAL PROCEDURE:

"§ 813-a. *Ex parte order for eavesdropping*

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of a crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based

shall in like manner be retained by the judge or justice denying the same.

§ 813-c. *The motion in general*

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The Court shall hear evidence upon any issue of fact necessary to determination of the motion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty."

STATEMENT

Between July, 1963 and February, 1964, the District Attorney for New York County conducted a massive, secret, electronic surveillance over the affairs of two labor organizations. Three separate places were "bugged": the office of Local 1101, Communications Works of American (CWA), the office of the Communications Division of the International Brotherhood of Teamsters (IBT), and Rooms 612-14 in the Hotel Forrest, all in New York. This eavesdropping was done pursuant to the purported authority of six orders obtained from several justices of the Supreme Court,

New York County, on applications under Section 813-a, Code of Criminal Procedure, each order allowing installation of equipment "to overhear and record . . . any and all conversations, communications and discussions that may take place in" the specified place. The order covering the CWA office was twice extended by different justices until it encompassed a six month period. The IBT eavesdropping order lasted four months. The "bug" in Rooms 612-14 of the Hotel Forrest was authorized for two months and was not renewed. In all three places, the equipment was installed by trespass (A. 236-37, 261-62, 268-69, 275-76, 282-83, 289-90, 295-96).[2]

With evidence gained through such eavesdropping, the District Attorney obtained an indictment against these appellants and Kenneth Burkard, Morgan Seifert and William Griffin, charging conspiracy to commit assault, coercion and violations of Penal Law, Sections 555 and 1423, subdivision 6 (A. 21-26). On June 12, 1964, a superseding indictment was returned, charging, in separate counts, conspiracies to violate Penal Law, Section 555, and Penal Law, Section 1423, subdivision 6 (A. 46-53).

While the original indictment was still pending, counsel for William M. Griffin [at that time a co-defendant but later severed for separate trial (A. 122)] learned that there was a recording of an alleged incriminatory conversation (A. 27-29). Inferring that eavesdropping had been conducted, counsel moved, under Section 813-c, Code of Criminal Procedure, and

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[2] Page references are to the printed record before the Court of Appeals, the pagination of which is carried through in the Record filed in this Court.

the Fourth Amendment to the United States Constitution, for suppression of all eavesdropped conversations and recordings of eavesdropped conversation (*ibid.*). That motion, renewed against the superseding indictment on behalf of all the defendants (A. 11), was denied on October 6, 1964.

When the case came to trial, the Assistant District Attorney had marked for identification the six eavesdropping orders and twenty-three reels of tape, purporting to be recordings of conversations overhead pursuant to the orders (A. 133-39). Counsel for the appellants then moved to suppress "*the tapes* marked for identification and such *other tapes* as may be offered under similar circumstances" (A. 144; emphasis supplied.)

Counsel for the remaining defendants joined in that motion (A. 150). On March 22, 1965, all the appellants renewed their motions "for a suppression of all of the items *marked for identification* heretofore by the District Attorney. . . ." (A. 242; emphasis supplied.) The motions to suppress were denied orally on March 22, 1965 (A. 244-45), and in an opinion on July 23, 1965 (A. 115-119).

Upon the denial of their motions to suppress, all the defendants withdrew their not guilty pleas and entered negotiated pleas of guilty to Section 244, subdivision 1, Penal Law, the misdemeanor of third degree assault (A. 248-51).

In the case of each defendant, counsel, in offering the guilty plea, made it clear that the pleas were being entered so as to test on appeal, pursuant to Section 813-c, Code of Criminal Procedure, the constitution-

ality of obtaining evidence in this manner. Counsel said:

> "... one of the considerations in offering his plea is that certain evidence has been illegally and unconstitutionally obtained and intended to be used by the prosecution; that he intends to appeal from the order of this Court denying his motion to suppress such evidence by appealing from the final judgment of conviction.". (A. 248-50).

Pursuant to a certificate of reasonable doubt granted by the trial justice on July 23, 1965, the appellants, as well as the other defendants, appealed to the Appellate Division. In that Court, the District Attorney, for the first time, took the position that Section 813-c was inapplicable to eavesdrop evidence and that, the Appellate Division, therefore, had no jurisdiction over the appeal. That Court adopted the District Attorney's view and dismissed the appeal, with leave to the appellants to withdraw their guilty pleas and go to trial on the indictment.

On appeal to the Court of Appeals, by permission of one of the judges thereof, that Court affirmed the orders of the Appellate Division in a Brief *per curiam* opinion which included the following sentence:

> "*Recordings of conversations made pursuant to judicial orders authorizing eavesdropping* under section 813-a of the Code of Criminal Procedure, *are not such property 'unlawfully obtained'* and a party aggrieved by a denial of a motion addressed to such recordings is left to appeal on the general avenues open in criminal cases." (Emphasis supplied.)

The Court of Appeals went on to state that the appeal from the Appellate Division had been properly allowed and was "considered on the merits".

THE QUESTIONS ARE SUBSTANTIAL

This case calls directly into focus New York's permissive eavesdropping law, Section 813-a, Code of Criminal Procedure, whereby any District Attorney or any police officer above the rank of sergeant may apply to a justice of the supreme court or a judge of any other court of general jurisdiction and obtain authorization to overhear and record any and all conversations which take place within certain premises.

The case had its origin as a labor dispute. Local 1101 of the Communications Workers of America, then under the presidency of appellant Henry Habel, was one of the largest local unions in the country representing employees of the Bell Telephone System. Appellants McGovern and Rodriguez were active in the affairs of that local union. The Communications Workers of America and Local 1101 had been certified by the National Labor Relations Board to represent employees in the plant department of the New York Telephone Company since 1961. In December of 1963, the Communications Division of the International Brotherhood of Teamsters filed a petition with the National Labor Relations Board which contested the representational rights of the Communications Workers of America and Local 1101. A representation election was scheduled by the Board for February 14, 1964.

In late December of 1963, Local 1101, after weeks of internal discussion and debate, voted to disaffiliate from the Communications Workers of America and to affiliate with the International Brotherhood of Teamsters. The indictments in this case followed shortly thereafter and flowed directly from activity

allegedly occurring during the course of this representational campaign.

As conceded by the Assistant District Attorney at the trial, the state's case depended upon the introduction of evidence secured pursuant to eavesdrop orders issued by the Justices of the New York Supreme Court. Following such authorization, eavesdropping devices were placed in at least three separate locations "without the consent, knowledge and authorization of the defendant [or] of the occupants of the three respective premises". (A. 236-237) These eavesdropping devices were capable of overhearing all conversations which took place within the premises in question, although not all such conversations were recorded, the police detective-auditors being instructed only to record those conversations which related to the crime or crimes then under inquiry. Original and renewal authorizations for such eavesdropping devices covered virtually the entire period of time during which, according to the indictment, the conspiracy continued. The conspiracy was alleged to have existed between April 1963 and January 8, 1964. The duration of the eavesdropping authorization, as shown by the following table, encompasses that period.

Time	Location
July 3, 1963 -December 28, 1963 (original and two renewal orders)	Office, Communications Workers of America, Local 1101, Mezzanine Floor, Hotel Forrest (P. Exs. 1, 2, 3, A. 261-262, 268-69, 275-76)
September 12, 1963-November 11, 1963 and December 20, 1963-February 19, 1964 (original and one renewal order)	Office, Communications Division, International Brotherhood of Teamsters, Room 437, 150 5th Ave. (P. Exs. 21, 22, A. 282-283, 289-290)
November 6, 1963-January 4, 1964	Rooms 612-14, Hotel Forrest (P. Ex. 29, A. 295-296)

ARGUMENT

1. While the only thing "seized" through the utilization of the eavesdropping technique in this case was the spoken word, it is by now well settled that the spoken word comes within the ambit of Fourth (and, consequently, Fourteenth) Amendment protection. The concept that the Fourth Amendment protected only material things, *Olmstead* v. *United States,* 277 U.S. 438, 464 (1938), was forever laid to rest in *Irvine* v. *California,* 347 U.S. 128 (1954). The opinions in *Irvine* destroyed what Justice Murphy, dissenting in *Goldman* v. *United States,* 316 U.S. 129, 141 (1942), described as the "strange doctrine that keeps inviolate the most mundane observations entrusted to the permanence of paper, but allows the revelation of thoughts uttered within the sanctity of private quarters." *Irvine* has been followed more recently in *Silverman* v. *United States,* 365 U.S. 505 (1961), and *Wong Sun* v. *United States,* 371 U.S. 471 (1963). In both of those cases, this Court agreed that the spoken word was within the protection of the Fourth Amendment to the United States Constitution and, in *Wong Sun,* the Court commented: "It follows from our holding in *Silverman* v. *United States,* 365 U.S. 505, that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects'." 371 U.S., at 485.

And the Court has "been far from niggardly in construing the physical scope of Fourth Amendment protection." *Lanza* v. *New York,* 370 N.Y. 139, 143 (1962). In addition to the home, which none would assert falls without Fourth Amendment protection, the Amendment has been construed to include a business office, *Silverthorne Lumber Company* v. *United States,* 251

U.S. 385 (1020); a store, *Amos* v. *United States*, 255 U.S. 313 (1921); a hotel room, *United States* v. *Jeffers*, 342 U.S. 48 (1951); an apartment, *Jones* v. *United States*, 362 U.S. 257 (1960); an automobile, *Carroll* v. *United States*, 267 U.S. 132 (1925); an occupied taxi cab, *Rios* v. *United States*, 364 U.S. 253 (1960). Other courts have included a desk in a government office, *United States* v. *Blok*, 188 F. 2d 1019 (D.C. Cir. 1951); and an occupied telephone booth, *United States* v. *Stone*, 232 F. Supp. 396 (N.D. Tex. 1964); *United States* v. *Madison*, 32 U.S. Law Week, 2243 (D.C. Gen. Sess. 11-18-63); *contra United States* v. *Borgese*, 235 F. Supp. 286 (S.D. N.Y. 1964). Each of this Court's decisions was reaffirmed in *Lanza* v. *New York*, *supra*, with the added caveat that the ultimate scope of the Amendment was yet to be reached. 370 U.S., at 143. It follows, therefore, that the places within which the eavesdropping occurred, two business offices (*Silverthorne Lumber Co.* v. *United States*, *supra*) and a hotel room (*United States* v. *Jeffers*, *supra*) are within the area of Fourth (and consequently, Fourteenth) Amendment protection. It further follows from that fact that anything seized therefrom by state officers, unless pursuant to constitutional authority, was inadmissible under *Mapp* v. *Ohio*, 367 U.S. 643 (1961).

No extensive discussion is necessary to establish the proposition that eavesdropping, accomplished or accompanied by a trespass, constitutes a Fourth Amendment violation. Again, *Silverman* v. *United States*, *supra*, together with *Lopez* v. *United States*, 373 U.S. 427 (1963), supply the complete answer. In *Silverman*, the Court was unanimous in holding:

> "Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided Court

> has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights." 365 U.S., at 510.

The Court, still unanimous, then went on to state the necessary rationale behind its decision:

> "The Fourth Amendment, and the personal rights which it secures, have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion. *Entick* v. *Carrington,* 19 Howell's State Trials 1029, 1966; *Boyd* v. *United States,* 116 U.S. 616, 626-630. This Court has never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen and relate at the man's subsequent criminal trial what was seen or heard." 365 U.S., at 511-512 (footnote omitted.)

A year later found the Court reversing a state court conviction under almost identical circumstances in *Clinton* v. *Virginia,* 377 U.S. 158 (1964).

The full import of the *Silverman* holding is found in the later case of *Lopez* v. *United States,* 373 U.S. 427, 438-439 (1963), in which the Court observed:

> "The Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable government agents to overhear conversations which would have been beyond the reach of the human ear. See, *e.g., Olmstead* v. *United States,* 277 U.S. 438; *Goldman* v. *United States,* 316 U.S. 129. *It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area. Silverman* v. *United States,* supra." (Emphasis supplied.)

Thus, "an unlawful physical invasion" of the constitutionally protected areas in question necessarily renders inadmissible any evidence derived therefrom. The fact of a "physical invasion" is clear from the record. It was admitted by the Assistant District Attorney in testimony under oath:

> "If your Honor please, *as the district attorney has* previously *stipulated* and stated, for the record, in reference to each of these orders, the device referred to, that is, *the eavesdropping device, was installed within the premises described in the order,* in each order, *in each of the three premises.*
>
> It is further stipulated that those reels, previously marked for identification, are recordings made of conversations taking place within the described premises within the periods described and authorized by the orders, all orders for three locations; *that the devices were installed within the premises described in each of the three sets of orders,* as previously stipulated numerous times, *without the consent, knowledge, or authorization of the defendants, of the occupants of the three respective premises;* that during the monitoring of this, each of these eavesdropping devices, that other voices were heard, other than those of the defendants, by the monitoring officers but that not all conversations heard were in fact recorded, only conversations pertaining to the subject matter of the inquiry were in fact recorded and this was pursuant to the instructions of the district attorney" (A. 236-247). (Emphasis supplied.)

2. Section 813-a, Code of Criminal Procedure, provides, in pertinent part:

> "An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge

> of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, *that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations, or discussions are to be overheard* or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved." (Emphasis supplied.)

To pass the muster of constitutionality, however, this statute must be matched against and tested by the Fourth Amendment to the United States Constitution:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and *no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.*" (Emphasis supplied.)

No eavesdropping order may properly issue unless a constitutionally valid search warrant could be obtained and no constitutionally valid warrant could be issued under the circumstances here shown.

(a) Search for and Seizure of Evidence

The affidavits of the Assistant District Attorneys requesting each order pursuant to Section 813-a, Code of Criminal Procedure, have one common denominator—they each conclude with the following:

> "In view of the foregoing, there is reasonable ground to believe that *evidence of crime may be*

> *obtained* by overhearing and recording conversations [here follows the description of the place]" (A. 264, 271, 278, 285, 292). (Emphasis supplied.)

The supporting affidavits of Assistant District Attorney Scotti, Chief of the Rackets Bureau, in each case contain the same assertion:

> "Based upon the facts set forth in Mr. [name of assistant] affidavit, I respectfully state to the Court my opinion that there is reasonable ground to believe that *evidence of crime may be obtained* . . ." (A. 266, 273, 280, 287, 293) (Emphasis supplied.)

And each court order states:

> "It appearing . . . that there is reasonable ground to believe that *evidence of crime may be obtained* by overhearing . . ." (A. 261, 268, 275, 282, 289, 295). (Emphasis supplied.)

The constitutional vice in each case is that a warrant may not issue simply to secure evidence.[3]

A search simply for incriminating evidence has been barred since common law days. In *Entick* v. *Carrington,* 19 How. St. Tr. 1030, 1073 (1765), the case from which our concept of unlawful search and seizure emanates, see *Boyd* v. *United States,* 116, U.S. 616, 626-627, 630 (1886), Lord Camden observed:

> Lastly it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering *evidence.* I wish some cases need have been shown, where the law forceth *evidence* out of

[3] Note that the statute itself, Section 813-a, Code of Criminal Procedure, purports to authorize such trespassory eavesdropping if "there is reasonable ground to believe that evidence of crime may be thus obtained." See *Eavesdropping Orders and the Fourth Amendment,* 66 Col. L. Rev. 355 (1966).

> the owner's custody by process * * * In the criminal law such a proceeding was never heard of * * *.
>
> * * *
>
> "It is very certain that the law obligeth no man to accuse himself; * * * and it would seem that a *search* for *evidence* is disallowed on the same principle."

This Court has many times stated this rule by pointing out that search warrants may constitutionally be issued only for instruments of crime, fruits of crime and contraband. *Boyd* v. *United States, supra; Weeks* v. *United States,* 232 U.S. 383 (1914). As specifically held in *Gouled* v. *United States,* 255 U.S. 298, 309 (1920), a search warrant may not be used as a means of gaining access "solely for the purpose of making search to secure evidence." The Court recently restated the distinction in *Harris* v. *United States,* 331 U.S. 145, 154 (1947):

> "This Court has frequently recognized the distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand, those objects which may validly be seized including the instrumentalities and means by which a crime is committed, the fruits of crime such as stolen property, weapons by which escape of the person arrested might be effected, and property the possession of which is a crime."

And see *Schmerber* v. *California,* 384 U.S. 757, 768, n. 10 (1966).

The eavesdropping orders in question clearly and precisely violate this canon, in that as purportedly authorized by state statute, they are sought and issued for only one purpose—the seizure of testimonial utter-

ances as evidence. This, alone, is constitutionally impermissible.

(b) Lack of Precision

A constitutional imperative for a valid warrant is that it describe with precision what is to be seized. In *Marron* v. *United States,* 275 U.S. 192, 196 (1927), this Court stated:

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. *As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.*" (Emphasis supplied.)

This statement from *Marron* was recently reaffirmed in *Stanford* v. *Texas,* 379 U.S. 476, 485 (1965), in which a search warrant no more general than the one at bar was invalidated, the Court saying, unanimously:

> "For we think it is clear that this warrant was of the kind which it was the purpose of the Fourth Amendment to forbid—a general warrant.
>
> * * *
>
> The indiscriminate sweep of that language [i.e., the language of the warrant] is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, false to its history." 379 U.S., at 480, 486.

The same observations must be made of the eavesdropping authorization in the case at bar—"any and all conversations, communications and discussions" (A. 261, 268, 275, 282, 289-290, 295). This must unquestionably be the general warrant condemned by the

Fourth Amendment, by *Marron* and by *Stanford,* all *supra.*

As to the "discretion of the officer executing the warrant", *Marron* v. *United States, supra,* the record is clear that, contrary to accepted constitutional principles, the officer had and exercised considerable discretion. The testimony of Assistant District Attorney Andreoli on that point is uncontradicted.

> "*Examination by Mr. Rabinowitz* [counsel for a co-defendant]:
>
> Q. Mr. Andreoli, if the devices in fact record all of the conversations that took place in the premises which were subject to the eavesdropping device?
>
> * * *
>
> A. The instructions to the detectives were not to record conversations that did not pertain to the subject of the investigation.
>
> Q. And, so far as you know, did they carry out those instructions? A. As far as I know, the instructions were carried out.
>
> Q. Now were the instructions to the officer, also, to record all of the conversations that did pertain to the subject of the inquiry? A. To the subject of the inquiry and any other crime disclosed by the conversations.
>
> Q. Yes. Were those the instructions? A. Yes.
>
> Q. So that the total of your testimony is that your instructions to the officers were that they were to secure recordings of all evidence pertaining to the crimes under investigation, but nothing else. A. And related crimes.
>
> Q. And related crimes, but nothing else. A. Yes. In other words, they did not record the ordinary union business. They did not record conversations pertaining to the personal relations of these defendants of a social nature.
>
> Q. But they did record, or at least they had instructions to record all conversations with re-

> spect to matters that might be evidence either of this crime or of any related crime. A. Yes. And I might point out that some of the recordings would contain, within a particular conversation, references to matters not pertaining to crime.
>
> Q. Well, that would normally be true in any kind of a free conversation, wouldn't it? A. That is correct (A 238-239).

Thus the officers had, and exercised, considerable discretion contrary to constitutional requirements.

(c) Lack of Probable Cause

The constitutional requirement of probable cause is most recently set out in *Aguilar* v. *Texas,* 378 U.S. 108, 114-115 (1964):

> "Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant *Jones* v. *United States,* 362 U.S. 257, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, see *Rugendorf* v. *United States,* 376 U.S. 528, was 'credible' or his information 'reliable'. Otherwise, 'the inferences from the facts which lead to the complaint' will be drawn not 'by a neutral and detached magistrate,' as the Constitution requires, but instead, by a police officer 'engaged in the often competitive enterprise of ferreting out crime.' *Giordenello* v. *United States, supra,* at 486; *Johnson* v. *United States, supra,* at 14, or as in this case, by an unidentified informant." (Footnote omitted)

Thus, the decision as to probable cause [or, under Section 813-a, Code of Criminal Procedure, "reasonable

ground to believe"] must be determined by an independent judicial officer, *United States* v. *Lefkowitz,* 285 U.S. 452, 464 (1932), must be based upon an affidavit (Fourth Amendment, itself), which in turn, must contain sufficient background information so that the judicial officer can make an independent determination, *Aguilar* v. *Texas, supra,* and, while it may be predicated upon an informant whose name need not be revealed, there must be some information "from which the officer concluded that the informant. . . was 'credible' or his information reliable." *Aguilar* v. *Texas, supra.* It is on this latter point that the original eavesdropping order must fail. The affidavit in support of the order merely recites:

> "*This office has received information from a confidential informer* that Kenneth Burkhart (sic) who is acting on behalf of the International Brotherhood of Teamsters in an effort to supplant the Communications Workers of America as the bargaining agent for the New York Telephone Company, paid $100 to have a member of the Communications Workers of America beaten up.
>
> "On June 20, 1963, Burkhart (sic) in a discussion with the informant concerning 'contracts' for future assaults upon people opposing the teamsters stated that he was going to have a conference with his associates that evening to determine the steps to be taken in the future.
>
> "On June 20, 1963, Burkhart (sic) was observed to enter the Communications Workers of America, union office at the Hotel Forrest, 224 West 49th Street on the Mezzanine Floor, City and County of New York with five men" (A 263-264). (Emphasis supplied.)

Nothing appears which suggests the reliability of the "confidential informer", and nothing on which the

"neutral and detached Magistrate [which] the Constitution requires" could make an independent judgment of his reliability. For that reason, alone, the first eavesdropping order must fail. *Aguilar* v. *Texas, supra.*[4]

Each of the subsequent orders is dependent upon evidence secured from the first. Thus, the affidavit supporting the renewal order states:

> "On July 3, 1963, Honorable Joseph A. Sarafite Justice of the Supreme Court signed an order authorizing the same overhearing and recording sought for herein. This order expires September 2, 1963. *An intercepted conversation made pursuant to said court order* on August 26, 1963, discloses statements made by Henry Habel, president of Local 1101, Communications Workers of America to another union member. . ." (A 271). Emphasis supplied.)

The affidavit supporting the next renewal order states:

> "On October 22, 1963, *in a conversation recorded pursuant to court order,* Henry Habel, president of Local 1101, Communications Workers of America, discussed. . ." (A 277). (Emphasis supplied.)

---

[4] In his opinion on the motion to suppress, the trial justice recited as facts, not only the contents of the affidavit but also matters not found therein—(1) that the informant's name was John Howard, and (2) that Howard's information was "verified for accuracy and reliability by recording Howard's conversations with the defendant Burkard with the consent of Howard" (A. 115-116). This, of course, was error for facts sufficient to justify issuance of a warrant must "appear on the face of the complaint". *Giordenello* v. *United States,* 357 U.S. 480, 487 (1958). The error was committed, not because the trial justice misconceived the applicable law, but rather because he mistakenly assumed that all the facts were in the affidavit for after reciting the above facts, he stated that the two Assistant District Attorneys "swore to the above mentioned facts in affidavits . . ." (A. 116).

Thus, each of the two renewal orders is predicated upon evidence which was unconstitutionally seized. The state may not "boot strap" itself in such a way as to avoid the argument of unconstitutionality. Although the question of whether a valid warrant may be *partially* premised upon evidence seized unconstitutionally was specifically left open in *Silverman* v. *United States,* 365 U.S. 505, 507, n.1 (1961), to uphold its use in this case would be to transgress the basic canon laid down by Mr. Justice Holmes in *Silverthorne Lumber Co.* v. *United States,* 251 U.S. 385, 391-392 (1920), that the government may not use unlawfully seized evidence to enable it to obtain valid evidence through legal process. "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence shall not be used before the court, but that it shall not be used at all." *Id.,* at 392.

The same vice infests each other order. The original order for eavesdropping at the Communications Division office of the International Brotherhood of Teamsters (A 284-286), although in greater detail, still gives no additional information on which an independent judgment can be made as to the reliability of a "confidential informant". *Aguilar* v. *Texas, supra.* The affidavit in support of the renewal of this order states only conclusions and runs afoul of the principle of *Giordenello* v. *United States,* 357 U.S. 480, 486 (1956), that "the Commissioner must judge for himself the persuasiveness *of the facts* relied on by a complaining officer. . . . He should not accept without question the complainant's *mere conclusion.* . . ." (Emphasis supplied.)

Finally, the last order relied upon by the State is clearly based upon prior intercepted conversations:

> "Information received from a confidential informer *and evidence obtained by overhearing conversations, recorded pursuant to court order,* disclose. . ." (A 297) (Emphasis supplied.)

See *Silverthorne, supra.*

CONCLUSION

The appellants respectfully assert that substantial questions of law and policy are presented by this appeal and pray that probable jurisdiction be noted.

EDWARD BENNETT WILLIAMS
RAYMOND W. BERGAN
1000 Hill Building
Washington, D. C. 20006

HENRY MAYER
19 West 44th Street
New York, New York 10036

Counsel for Appellants Habel, McGovern and Rodriguez

Of Counsel:

WILLIAMS & WADDEN
1000 Hill Building
Washington, D. C. 20006

MAYER, WEINER & MAYER
19 West 44th Street
New York, New York 10036

APPENDIX TO JURISDICTIONAL STATEMENT

SUPREME COURT OF THE STATE OF NEW YORK
SPECIAL AND TRIAL TERM, PART XXXIII

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

against

HENRY HABEL, ARTHUR McGOVERN, KENNETH BURKHARD, JULIO RODRIGUEZ, MORGAN SEIFERT, *Defendants-Appellants*.

SCHWEITZER, J.:

This is a motion to suppress evidence seized pursuant to eavesdropping orders issued under section 813-a of the Code of Criminal Procedure. The facts show that one John Howard informed the District Attorney's Office of New York County that Kenneth Burkhard paid him $100 to have a member of the Communications Workers Union beaten up. Burkhard, he explained, was acting on behalf of the International Brotherhood of Teamsters (hereinafter referred to as the Teamsters) in an effort to supplant the Communications Workers of America (hereinafter referred to as the C.W.A.) as bargaining agent for the New York Telephone Company. On June 20, 1963 Burkhard discussed with Howard "contracts" for assaults upon people opposed to the Teamsters, but said he would have to confer with his associate that evening to determine steps to be taken in the future. Later that day, Burkhard and five others were observed entering the office of the C.W.A., Local 1101, located on the mezzanine floor of the Hotel Forrest, 224 West 49th Street, New York City. The statements of John Howard were verified for accuracy and reliability by recording Howard's conversations with the defendant Burkhard with the consent of Howard.

In order to investigate further possible violations of Sections 850, 380, and 240 of the Penal Law, Assistant District Attorneys Peter Andreoli and Alfred J. Scotti swore to the aforementioned facts in affidavits dated July 3, 1963,

and petitioned the Honorable Joseph A. Sarafite, a Justice of the Supreme Court, to issue an order referring to or directing the overhearing of conversations taking place at the above-mentioned offices. That order was signed on July 2, 1963 and made effective to and including September 2, 1963. A renewal of that order was signed by the Honorable Abraham Gellinoff on August 30, 1963, Justice Sarafite being in Europe at that time, and it was made effective to and including October 29, 1963. Finally, a similar renewal order pertaining to the same premises was signed by the Honorable John A. Mullen on October 29, 1963, Justice Sarafite being assigned in another county and not being available. This order was effective to and including December 28, 1963. A copy of the original order and affidavit was attached to each renewal order as well as affidavits which pointed out what further facts had been uncovered in the course of investigation which evidenced a conspiracy.

The eavesdropping device was installed in the C.W.A. office of Local 1101 pursuant to court order without the consent of the defendants or of anyone else. On August 23, 1963, a conversation between Habel and another union member was intercepted. Habel declared that he expected to acquire a .38 calibre gun, that he had no permit to carry such a gun, and that he had no intention of applying for such a permit. They disclosed that they intended to shoot a person opposed to their union activities, not kill him, but cripple him in both legs.

On September 9, 1963, Burkhard requested the informant, Howard, to arrange to beat up another member of the C.W.A. sometime in the future. On September 10, 1963, Burkhard met with William Olsen and William Genoese who are employed in the Communications Division of the Teamsters, and the following day, advised Howard that there had been a change: a more important figure was to be beaten up in the next few days; the plan was to incapacitate him for two to three months. Police information

disclosed that Olsen and Genoese occupied room 437, 150 Fifth Avenue, New York City, Communications Division of the International Brotherhood of Teamsters.

Assistant District Attorneys Andreoli and Scotti set forth these facts (together with the facts contained in their affidavits of July 3, 1963) in affidavits dated September 12, 1963, on the basis of which the Honorable Justice Sarafite signed an order directing the overhearing of conversations at these premises. The order was extended to and including November 11, 1963. Evidence obtained pursuant to this order disclosed that Habel had contacted Genoese and the two were conspiring together to frighten those opposed to the Teamsters. On the basis of this fact and the original affidavits and orders of September 12, 1963, a renewal of this order was signed by the Honorable John Mullen on December 20, 1963 and made effective through February 19, 1964.

Information received from John Howard and evidence obtained pursuant to court orders all pointed to the fact that Habel and Burkhard had agreed to use physical force to create a new union in place of the C.W.A. or to turn control of the union over to the Teamsters. In furtherance of their plan, Habel had set up a "secret" office in rooms 612-614 Hotel Forrest registered in the name of Walker. On November 3, 1963, in a conversation recorded pursuant to court order, Burkhard called room 612. Habel answered, identifying himself as Walker, and Burkhard responded, "I'll be right up." On the basis of these facts set forth in the affidavits of Assistant District Attorneys Andreoli and Scotti, Justice Sarafite signed an overhearing order for rooms 612-614 on November 4, 1963. The order was made effective through and including January 4, 1964.

As a result of the eavesdropping conducted pursuant to these court orders, the conspirators who were directing the actions of the defendant Burkhard were identified and their conspiratorial conversations were overheard, and the as-

sanlts which were paid for were in fact prevented. It is to be noted that conversations pertaining to union matters and social relations were not recorded.

The defendants were charged with two counts of conspiracy. The first charged them with having conspired with each other and with others to commit the crimes of assault, coercion, and violations of Section 555 of the Penal Law, during the period from April, 1963 to January 8, 1964. In twenty-five overt acts it is alleged that eight named persons were to be beaten as well as others; that money was paid for this purpose and that a threatening telephone call was made. The second count charged a conspiracy during this same period to commit crimes of injury to property and to interfere with telephone lines. There are nine overt acts alleged.

The case came to trial before this Court, and after introducing the aforementioned orders and affidavits as well as reels of tape recorded pursuant thereto, a motion to suppress the evidence was heard and denied. Whereupon, on March 28, 1965 the defendants pleaded guilty to a lesser charge of conspiracy to commit the crime of assualt in the third degree, a misdemeanor.

On the facts as set forth, this Court is satisfied that the information in the possession of the District Attorney's office was sufficient to form probable cause for the issuance of the eavesdropping order in conformity with the requirements of Section 813-a of the Criminal Code, and further, that the information obtained as a result of the first order was sufficient under the requirements of the statute to authorize the further issuance of additional orders. Indeed, each affidavit is itself sufficient on its face to procure a warrant for eavesdropping. I further find that Section 813-a conforms to the constitutional requirements for a warrant.

The motion to suppress is therefore denied.

Dated: July 23, 1965

/s/ M. D. S.
J.S.C.
MITCHELL D. SCHWEITZER

SUPREME COURT, APPELLATE DIVISION
First Department, February 1966

Bernard Botein, P.J.,
James B.M. McNally,
Samuel W. Eager,
Ellis J. Staley, Jr., JJ.

9929, 9930, 9931, 9932, 9933

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiffs-Respondents,

against

HENRY HABEL, ARTHUR McGOVERN, KENNETH BURKHARD, JULIO RODRIGUEZ and MORGAN SEIFERT,
Defendants-Appellants.

Appeal by defendants from judgments of conviction of the Supreme Court, New York County (Schweitzer, J.), rendered July 23, 1965, convicting defendants, on their pleas of guilty, of the crime of Conspiracy to Commit the Crime of Assault in the Third Degree.

Raymond W. Bergan of counsel (Henry Mayer, Abraham Weiner and Jerome Wenig with him on the brief; Mayer, Weiner & Mayer and Williams, Wadden & Stein, attorneys) for appellants Habel, McGovern and Rodriguez.

Victor Rabinowitz of counsel (Leonard B. Boudin and Arthur Schutzer with him on the brief; Rabinowitz & Boudin, attorneys for appellant Seifert; Samuel A. Neuberger, attorney for appellant Burkhard) for appellants Seifert and Burkhard.

John J. McAvoy, Cooperating Attorney, New York Civil Liberties Union, amicus curiae.

Michael Juviler of counsel (H. Richard Uviller with him on the brief; Frank S. Hogan, District Attorney) for respondent.

Per Curiam:

After the trial court denied a motion by defendants to suppress evidence of conversations obtained pursuant to eavesdropping orders issued under section 813-a of the Code of Criminal Procedure, each defendant, with the permission of the court, withdrew his plea of not guilty and pleaded guilty to the crime of conspiracy to commit the crime of assult in the third degree, a misdemeanor, under the first count of the indictment, the plea to cover the entire indictment. Following these pleas, judgments of conviction were entered on July 23, 1965, on which date an order was also entered implementing the previous denial of the motion to suppress. The People urge that the appeals taken from these dispositions should be dismissed on the ground that in the absence of a permissive statute a plea of guilty "poses no question for review" (*People* v. *Mason*, 307 N.Y. 570, 575). Defendants submit that such a statute is found in section 813-c of the Code of Criminal Procedure.

The type of motion to which section 813-c applies, and the denial of which "may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty," is a motion for the return of "property, papers or things"

obtained by an unlawful search and seizure, or for the suppression of their use as evidence. Eavesdropped conversations are not within the literal scope of section 813-c (*People* v. *Laverne*, 14 N Y 2d 304, 309-310). While it is argued, not without some force, that the section is sufficiently elastic to allow suppression of tape recordings procured as a consequence of an initial trespass, we may not overlook that title II-A of the Code of Criminal Procedure deals expressly and exclusively with eavesdropping (which by definition includes the recording of a conversation by means of instrument [Penal Law, § 738]); that the suppression procedure provided by title II-B, of which section 813-c is a part, has no parallel in title II-A; and, more immediately pertinent, that the Legislature chose to withhold from the latter title any authority to entertain appeals of the instant character. It is concluded, accordingly, that the appeals should be dismissed.

The record indicates that the pleas of guilty were influenced by defendants' belief that appeals would lie to test the legality of the eavesdropping, and defendants informed the court of their intention to appeal at the time their pleas were offered. The People's brief acknowledges that "where, as here, the defendants' misconceptions were announced at the time of pleading, and were not corrected by the prosecutor or court," withdrawl of a plea of guilty is warranted in the interest of justice.

The appeals should be dismissed. Of course, defendants may move to withdraw their guilty pleas in the court below, presumably with the consent of the People, as indicated in their brief.

ALL CONCUR.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 29th day of March, 1966.

Present—Hon. BERNARD BOTEIN,
PRESIDING JUSTICE,

Hon. JAMES B. M. MCNALLY,
Hon. SAMUEL W. EAGER,
Hon. ELLIS J. STALEY, JR.
JUSTICES

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

v.

HENRY HABEL, *Defendant-Appellant*.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County, rendered on July 23, 1965, convicting him of the crime of Conspiracy to Commit the crime of Assult in the third degree, and from an order of said Court entered on July 23, 1965, denying defendant's motion to suppress certain evidence,

And said appeal having been argued by Mr. Raymond W. Bergan of counsel for appellant, and by Mr. Michael Juviler of counsel for respondent; and a brief amicus curiae having been filed on behalf of The New York Civil Liberties Union; and due deliberation having been had thereon; and upon the Opinion Per Curiam of this Court filed herein,

It is unanimously ordered that the appeal from the judgment of the Supreme Court, New York County, rendered on July 23, 1965, and the order of said Court, entered on July 23, 1965, be and the same is hereby dismissed.

ENTER:

/s/ HYMAN W. GAMSO
Clerk.

FILED: MAR. 29, 1966

Opinion

STATE OF NEW YORK COURT OF APPEALS

No. 233

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*,

v.

HENRY HABEL, ARTHUR MCGOVERN, KENNETH BURKHARD, JULIO RODRIGUEZ, MORGAN SEIFERT, *Appellants*,

WILLIAM GRIFFIN, *Defendant*.

Per Curiam:

To pursue the special kind of appeal allowed "notwithstanding" a plea of guilty by the third paragraph of section 813-c of the Code of Criminal Procedure, conditions prescribed by that section must be met.

This kind of an appeal is authorized when taken from the denial of a motion for the return or suppression of property, papers or things "unlawfully obtained" which may be used in evidence in a criminal proceeding against the moving party.

Recordings of conversations made pursuant to judicial orders authorizing eavesdropping under section 813-a of the Code of Criminal Procedure, are not such property "unlawfully obtained" and a party aggrieved by a denial of a motion addressed to such recordings is left to appeal under the general avenues open in criminal cases. On the concession of the district attorney, appellants may, if they are so advised, withdraw their pleas of guilty.

The dismissal of the appeal by the Appellate Division was a final determination affecting a substantial right and the appeal to this court was properly allowed and is considered on the merits (Code Crimin. Pro., § 519 [5]; *People* v. *Pitts*, 6 N Y 2d 288; *People* v. *Pride*, 3 N Y 2d 545).

The orders should be affirmed.

• • •

Orders affirmed. Opinion Per Curiam. All Concur.

IN THE

Supreme Court of the United States

October Term, 1966

Office Supreme Court, U.S.
FILED
DEC 30 1966
JOHN F. DAVIS, CLERK

No. 807

KENNETH BURKARD and MORGAN SEIFERT,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

No. 808

HENRY HABEL, ARTHUR McGOVERN and JULIO RODRIGUEZ,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

FRANK S. HOGAN
District Attorney
New York County
Attorney for Appellee
155 Leonard Street
New York, New York 10013
212-RE 2-7300

H. RICHARD UVILLER
MICHAEL JUVILER
Assistant District Attorneys
Of Counsel



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IN THE

Supreme Court of the United States

October Term, 1966

No. 807

KENNETH BURKARD and MORGAN SEIFERT,
Appellants,

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THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

No. 808

HENRY HABEL, ARTHUR McGOVERN and JULIO RODRIGUEZ,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

On Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee moves to dismiss the appeals in the above-entitled cases on the ground that they are not within the jurisdiction of this Court, because the questions sought to be reviewed were not passed upon by the state courts, and because the appellate rulings rest on an adequate non-federal basis.

Jurisdiction

Appellants seek to invoke this Court's jurisdiction under 28 U. S. C. §1257(2) by contending that Section 813-a of the New York Code of Criminal Procedure, authorizing court-ordered eavesdropping upon probable cause, is unconstitutional on its face, and unconstitutional as applied in this case. However, these questions were never passed upon by the state appellate courts, the Appellate Division and Court of Appeals holding instead that such issues were not reviewable on appeal because the judgments of conviction were based on pleas of guilty.

Since the pleas of guilty were entered upon a misunderstanding as to the scope of review under state law, the appellate courts announced that appellants could withdraw their pleas of guilty and raise their claims as to eavesdropping at a trial, if they were so disposed; instead, appellants seek to raise them in this Court. But the state appellate rulings, interpreting state appellate procedures, are not challenged by appellants, and involve no federal constitutional question.

Statement

On January 20, 1964, the appellants and co-defendant, William Griffin, were indicted for conspiring, on behalf of the International Brotherhood of Teamsters, to commit various crimes in connection with an inter-union rivalry for representation of employees of the New York Telephone Company (21-6).* On April 23, co-defendant Grif-

* References, unless otherwise noted, are to pages of the printed record on appeal to the New York Court of Appeals.

fin moved for a hearing under Section 813-c of the New York Code of Criminal Procedure, on an application to suppress evidence obtained by eavesdropping (27). Because of duplication in pleading, however, the indictment was superseded by another, filed June 12, 1964, which forms the basis for the present convictions (46-53; Ind-247½—1964). The first count charged a conspiracy to commit the crimes of assault, coercion and other crimes, and alleged as some of the overt acts various preparations to use force against certain individuals, including Telephone Company executives, to deter opposition to affiliation with the Teamsters (46-50). The second count charged a conspiracy to commit the crimes of injury to property and injury to telephone property (51-3). The defendants pleaded not guilty on June 19 (54, 55, 61, 66, 71, 76).

On September 17, in the Motion Part of Supreme Court, the defendants moved for a severance, a bill of particulars, and suppression of any evidence obtained by eavesdropping after counsel filed notices of appearances (4-29). The defendants requested a specification whether evidence obtained by court-ordered eavesdropping was used against them (9, 16-17). By opinion dated October 6, 1964, the court (SCHWEITZER, J.) denied the applications, noting:

> "The motion for an order to suppress the use of certain recorded conversations is denied (People v. Golly, 250 N. Y. S. 2d 210). However, the defendants are not precluded from raising any constitutional issue regarding the admissibility of this evidence at the time of trial. See People v. Laverne, 14 N. Y. 2d 304 (1964) where it was held that Title II-B of the Code of Criminal Procedure (813-a et seq.) applies only to tangible property" (45).

On February 1, 1965, the trial began. The case against co-defendant Griffin was severed (100, 121-2) and the remaining defendants made a new motion for severance. A juror was sworn, and the matter was adjourned to February 8 (120, 127). However, arguments and reargruments on the motion extended to March 9, when the motion was denied (103, 104, 112, 113, 127). The trial was begun anew on March 10, the juror previously sworn being discharged (132). The prosecutor stated that he intended to offer at trial certain conversations, recorded by court order (133-41). Copies of the papers were given the defendants (141-3), and the trial was adjourned for two days (141-2). On March 12, when the trial resumed, the defendants moved to exclude the recorded conversations from evidence, on the ground that the orders were invalid (144-58, 163-6). The court reserved decision, the trial was adjourned until Monday, March 15, when the court denied the motions (167).

The defendants then requested an evidentiary hearing, to inquire into all constitutional questions pertaining to the recordings (168), as well as "audibility, source and other matters" (168). Decision was reserved, and the selection of the jury was begun (174-6). The voir dire continued for the rest of the week, through March 19, by which time twelve jurors had been sworn (180-220).

On Monday, March 22, the court held an evidentiary hearing as to the eavesdropping orders (121, 122). After colloquy and stipulations concerning the orders (221-33), the defendants called the trial prosecutor as a witness. He testified as to matters alluded to in the affidavits that were presented upon the applications for the eavesdropping or-

ders. The court held the evidence admissible (244-5), and later entered an opinion with findings (115-19).

The day after the court ruled the recordings admissible, on March 23, 1965, the defendants moved to withdraw their pleas of not guilty, and were permitted to plead guilty to conspiracy to commit the crime of assault in the third degree, under the first count of the indictment (56, 62, 67, 77, 247-55). In so pleading, the defendants stated that they intended to preserve their "right" to contest the eavesdropping orders on appeal (248, 249, 250).

The Appellate Division, First Department, of the Supreme Court of the State of New York dismissed appellants' appeals, on the ground that in the absence of a permissive statute a plea of guilty poses no question for review; Section 813-c of the New York Code of Criminal Procedure, authorizing appellate review of pre-trial rulings on motions to suppress evidence notwithstanding a plea of guilty, does not apply to eavesdropped conversations obtained under Section 813-a of the Code. Under the circumstances of the case, however, and on the district attorney's concession on appeal, withdrawal of the pleas of guilty was warranted in the interest of justice [25 A. D. 2d 182, 268 N. Y. S. 2d 94 (March 29, 1966)].

On appeal to the New York Court of Appeals, appellants renewed their claims as to eavesdropping, and contended that the Appellate Division misinterpreted the state procedural statutes governing appeals. Appellee contended that the Appellate Division orders dismissing the appeals were not reviewable by the Court of Appeals, since they were not "final determinations" within the meaning of

Section 519(5) of the New York Code of Criminal Procedure, dealing with the jurisdiction of the Court of Appeals. This argument was rejected, the Court of Appeals ruling that the Appellate Division orders were appealable "on the merits." As to the "merits," the Court of Appeals agreed with the Appellate Division's interpretation of the state procedural statutes governing appeals, and affirmed that court's dismissal of the appeals. The Court of Appeals also ruled that appellants were free to withdraw their pleas of guilty.*

The Federal Questions Sought to be Reviewed were not Passed Upon.

Appellants' jurisdictional statements in this Court are devoted entirely to the admissibility of evidence obtained by court-ordered eavesdropping, a matter not passed upon on the state appeal; although the Court of Appeals deemed the Appellate Division orders reviewable "on the merits" (jurisdictional sta. of Habel, *et al.*, p. 9), this meant only that the narrow procedural question of appealability considered by the intermediate appellate court could be reviewed by the Court of Appeals. As to the statute appellants seek to draw in question, the Court of Appeals gave no "decision * * * in favor of its validity" [28 U. S. C. §1257(2)]. By the same token, appellants present no discussion whatever of the procedural questions ruled upon by the state appellate courts. Since "the federal question sought to be reviewed was not timely or properly raised,

* The jurisdictional statement of appellants Habel, McGovern and Rodriguez mistakenly reports that the Court of Appeals and the Appellate Division affirmed the appellants' convictions (pp. 1, 2).

or expressly passed on," it is not reviewable here [U. S. Sup. Ct. R. 16(1)(b)]. On appeal from a state court, appellants must show that "the rulings of the court" by their "nature" present a substantial federal question [U. S. Sup. Ct. R. 15(e)]; this appellants do not even attempt.

The Rulings Sought to be Reviewed Rest on an Independent and Adequate State Ground

The orders of the Court of Appeals and the Appellate Division rest on "an adequate non-federal basis" [U. S. Sup. Ct. R. 16(1)(b)], the wholly reasonable interpretation of state appellate requirements. Appellants make no suggestion that this was not an independent and adequate state ground for decision.

There is no federal constitutional requirement of pre-trial review of the admissibility of evidence obtained by eavesdropping, or any other question of evidence, or for review of such questions on appeal after a plea of guilty [*Siegel* v. *People*, 16 N.Y.2d 330 (1965), *cert. denied* —— U. S. —— (June 6, 1966); see *United States ex rel. Boucher* v. *Reincke*, 341 F.2d 977, 980-981 (2d Cir. 1965); *Alexander* v. *United States*, 290 F.2d 252 (5th Cir. 1961)]. The federal pre-trial motion to suppress has been applied to eavesdropping evidence in federal cases [see Fed. R. Crim. Proc. 41], but that experience carries no suggestion of a constitutional mandate. *Mapp* v. *Ohio* [367 U. S. 643, 659, n. 9 (1961)] expressly reserved to the states the formulation of appropriate procedures for enforcing the exclusionary rule of the Fourth Amendment. And Rule 41 itself has no provision for review of evidentiary questions after a plea

of guilty. Moreover, while federal courts purport to apply the Rule *per se* to electronically recorded evidence, in substance the Rule has no effect; as the cases cited by appellants show, the evidence in question is generally discovered only at trial, and the proceedings then amount to an application of the District Court's inherent power to examine questions of admissibility. Present New York remedies for testing the constitutional questions raised by appellants, thus far scorned by appellants, are more than adequate to protect their constitutional rights [see *People* v. *Habel*, 18 N.Y.2d 148, 272 N.Y.S.2d 357, 219 N.E.2d 183 (1966); *People* v. *McCall*, 17 N.Y.2d 152 (1966)]. And the binding option accorded these appellants of withdrawing their pleas precludes any claim of fundamental unfairness.

Conclusion

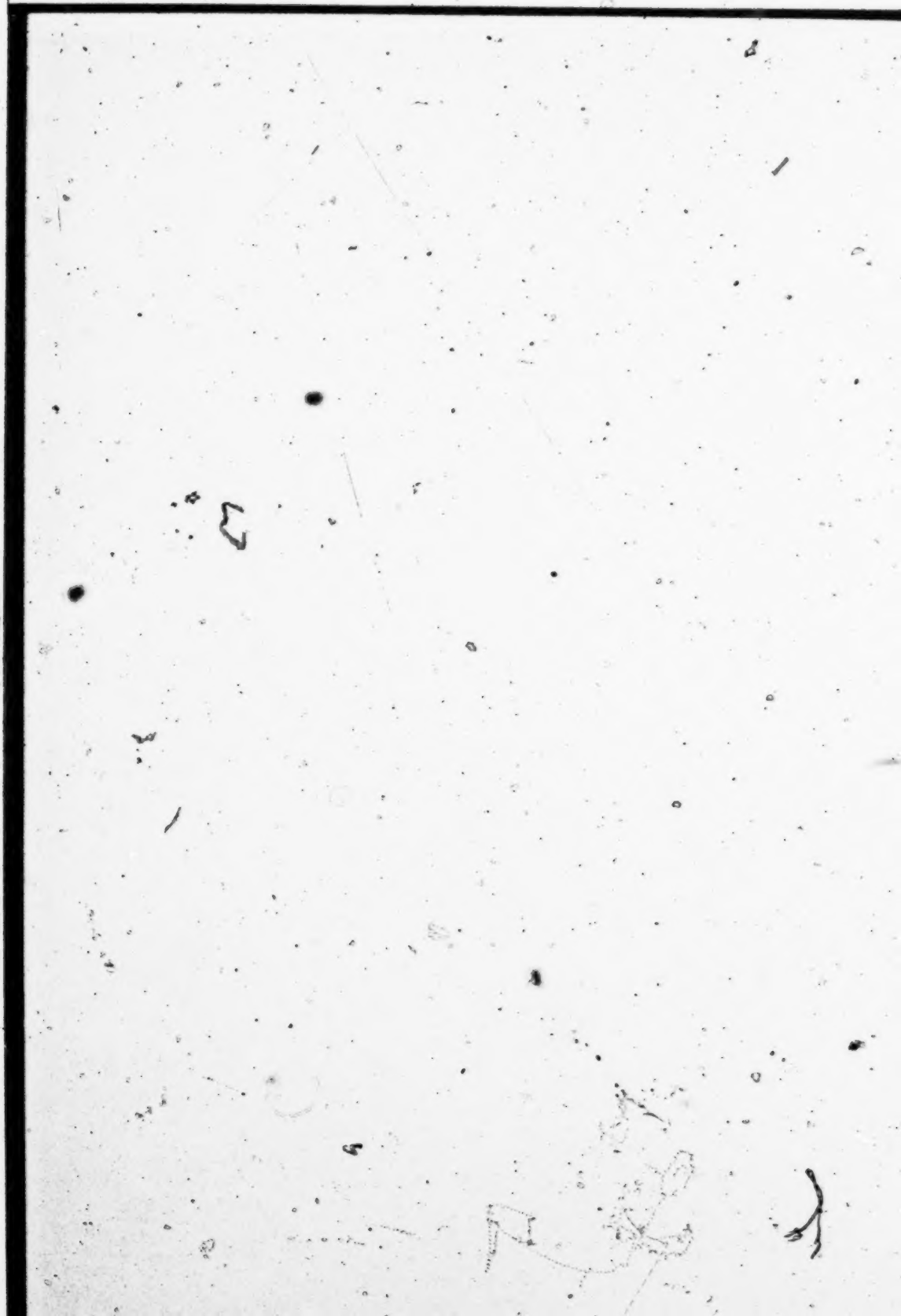
We respectfully submit, therefore, that the appeals should be dismissed.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
MICHAEL JUVILER
Assistant District Attorneys
Of Counsel

December, 1966



SUPREME COURT, U. S.
FILED
JAN 18 1967
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1966

No. 807

KENNETH BURKHARD and MORGAN SIEFERT,
Appellants,

v.

THE PEOPLE OF THE STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

ANSWER TO MOTION TO DISMISS

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
30 East 42nd Street,
New York, N. Y., 10017,

SAMUEL A. NEUBURGER,
30 Vesey Street,
New York, N. Y. 10007,

Attorneys for Appellants.

Of Counsel:

VICTOR RABINOWITZ,
LEONARD B. BOUDIN.

January 18, 1967.

IN THE

Supreme Court of the United States

October Term, 1966

No.

KENNETH BURKHARD and MORGAN SIEFERT,

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THE PEOPLE OF THE STATE OF NEW YORK.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

ANSWER TO MOTION TO DISMISS

I

The judgment of the State Court was a final judgment.

The appellants both pleaded guilty, pursuant to § 813-c of the Code of Criminal Procedure, reserving the right to appeal on constitutional and statutory grounds. A judgment of conviction was entered, and sentence imposed. The case thus differs from those cited at page 7 of the motion to dismiss, where interlocutory proceedings were involved.

The fact that the Appellate Division and the Court of Appeals have both suggested that appellants might move in the State Supreme Court to withdraw their pleas and go to trial cannot affect the finality of the judgment of conviction. Motions to reduce sentence, to withdraw pleas, for

a new trial, and similar relief are often available to defendants in criminal cases under a variety of circumstances. The existence of such post-judgment relief, or even the likelihood that it will be granted does not change the character of the judgment.

II

This Court has jurisdiction.

This case comes squarely within the decision of this Court in *NAACP* v. *Alabama*, 357 U.S. 449, where jurisdiction was challenged because, the state claimed, the wrong procedure had been followed in the state court. This Court disagreed, pointing out that petitioner had followed established procedural routes in seeking review of its constitutional claims in the state court. This Court said, at 357 U.S. 457:

> "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights."

Here appellants followed what were, at the time, established procedural requirements. In the State Supreme Court, the District Attorney and the presiding judge both agreed that appellants were proceeding properly to get review of their constitutional contentions (A 242-255; A 93). Their agreement was well-founded. See *Siegel* v. *People*, 16 N.Y.2d 330, 332 (1965); *People* v. *Rodriguez*, 11 N.Y.2d 279 (1962); *People* v. *Cohen*, 45 Misc.2d 403, 248 N.Y.S.2d 339, *aff'd as modified*, 24 A.D.2d 900, 264 N.Y.S.2d 886 (2d Dept. 1965); *People* v. *Beshany*, 43 Misc.2d 521 (1964); *People* v. *Rogers*, 46 Misc.2d 405 (Seneca Co. 1965); *People* v. *Berger*, 239 F. Supp. 216 (S.D.N.Y., 1965), in all of which the courts had said that § 813-c was available to test the admissibility of so-called "intangible" evidence.

Indeed, in *People* v. *Berger, supra,* the District Attorney specifically represented to the United States District Court that § 813-c was available to test the admissibility of eavesdrop evidence. See brief of District Attorney in *People* v. *Steinman,* Index No. 64 Civ. 3713, U.S.D.C., S.D.N.Y., incorporated by reference into *People* v. *Berger, supra.*

The statute in question (813-c) became effective in 1962. In the short time since its passage, the Court of Appeals, the Appellate Division, Second Dept., several Supreme Courts, the United States District Court, and the District Attorney had all, at one time or another, expressed the view that it applied to eavesdrop or other intangible evidence. The rights of appellants should not now be defeated because of a change in position. *Raley* v. *Ohio,* 360 U.S. 423.

III

The Court of Appeals had decided the issues herein adversely to appellants.

The issues in this case are substantially the same as in *Berger* v. *New York,* No. 615, October Term, 1966, *cert. granted* by this Court on December 5, 1966. Hence it cannot be said that the Court of Appeals has not spoken on the constitutional issues here present. This case and *Berger* were argued on the same day in the Appellate Division and in the Court of Appeals and were decided together in the latter court. The Court of Appeals was able to evade a decision of the constitutional issues here by a procedural device, but it has passed on them in *Berger,* and its evasion here should not stand in the way of appellants' rights to appeal.

CONCLUSION

The motion to dismiss should be denied.

Respectfully submitted,

VICTOR RABINOWITZ,
LEONARD B. BOUDIN,
SAMUEL A. NEUBURGER,
Attorneys for Appellants.

Of Counsel:
VICTOR RABINOWITZ,
LEONARD B. BOUDIN.

January 18, 1967.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 808

HENRY HABEL, ARTHUR MCGOVERN and JULIO RODRIGUEZ, *Appellants*

v.

THE PEOPLE OF THE STATE OF NEW YORK, *Appellee*

Appeal from the Court of Appeals of the State of New York

REPLY TO MOTION TO DISMISS

The State has moved to dismiss the appeal in this case (and in the companion case of *Kenneth Burkard and Morgan Seifert* v. *New York,* No. 807) upon the grounds that federal questions were not passed upon in the state courts and that the rulings under review rest upon adequate and independent state grounds. Since the solution under these circumstances, itself, involves a federal question which invokes this Court's jurisdiction, *Love* v. *Griffith,* 266 U.S. 32, 33-34 (1924); *Lovell* v. *Griffin,* 303 U.S. 444, 450 (1938); *Henry* v. *Mississippi,* 379 U.S. 443, 447 (1965), we set forth in this Reply the manner in which federal constitutional issues were raised and resolved in the lower courts.

1. The Federal Constitutional Issue Was Raised and Decided at the Trial Level

The Record is ample that federal constitutional issues were raised at trial. No other conclusion is possible.

As pointed out in the Jurisdictional Statement, the original indictment in this case, No. 247/1964, was returned on January 20, 1964 (A-54).* During the course of discussions with the District Attorney's office during April of 1964, and while other motions with respect to that indictment were pending, counsel for co-defendant William Griffin was advised by an Assistant District Attorney of the existence of intercepted conversations between Griffin and others (A-27). He thereupon filed, for defendant Griffin, a motion for the suppression of such evidence. (A-28) The appellants herein joined in that motion.

The State caused a superseding indictment to be returned on June 12, 1964. Motions addressed to the superseding indictment were then filed. The notice of motion for defendant Griffin, after reciting preliminaries, went on to state: "the undersigned will make a motion, pursuant to Section 813-c, Code of Criminal Procedure, and the Fourth Amendment to the United States Constitution, in Part XXX. . . for an order suppressing the content of certain recorded conversations between the defendant Griffin and others."

The appellants herein filed a similar motion which asked for the suppression of "the content of recorded conversations . . .". (A-5, 12) The affidavit in sup-

* References, unless otherwise indicated, are to the printed record before the New York Court of Appeals filed as a part of the Record herein.

port of the motion made by these appellants incorporated, in its entirety, the affidavit of counsel for the defendant Griffin.

An evidentiary hearing was denied by Justice Schweitzer, sitting in the Motions Part. In his Opinion, Justice Schweitzer wrote:

> "3. The motion for an order to suppress the use of certain recorded conversations is denied (*People* v. *Golly,* 250 N.Y.S. 2d 210). However, the defendants are not precluded from raising any constitutional issue regarding the admission of this evidence at the time of trial. See *People* v. *Laverne,* 14 N.Y. 2d 304 (1964) where it was held that Title II-B of the Code of Criminal Procedure (§ 813-c et seq.) applies only to tangible property." (A-45)

The reliance of Justice Schweitzer in his Opinion on *People* v. *Golly* was not a foreclosure to these appellants of the right to pursue their remedy. For, in *People* v. *Golly,* Justice Schweitzer, himself, had written:

> "It was Justice Geller's conclusion—after extended analysis of the practical and procedural problems involved—that '[*t*]*he nature and volume of the work in* [*a motion part of a criminal court*] *precludes prompt attention to motions to suppress requiring the holding of hearings*' (31 Misc. 2d at pp. 490, 491, 221 N.Y.S. 2d at p. 851).
>
> "It is to be noted that in enacting legislation to provide a procedural method for raising the suppression issue, the legislature likewise expressly provided that, where an indictment has already been had, 'the motion shall be made *in the court having trial jurisdiction* of such indictment' (Code Crim. Proc. § 813-c, emphasis supplied). Although I recognize that the legislature was concerned with jurisdiction of courts, rather

> than proper venue in a part within a given court, I am persuaded that, in deciding that the motion should be brought in a trial court, it was impressed with the same considerations of administrative case and practicality as was Justice Geller in the Gonzales case."

In light of Justice Schweitzer's opinion, as soon as this case was assigned to a trial part, defendants renewed their motion.

The record at trial reveals a *complete* evidentiary hearing of the constitutional issues raised by room eavesdropping accomplished by a trespass and the trial court's decision reflects a determination *on the merit of that issue.* (A-115; particularly A-119) Pleas of guilty were then entered and accepted on that basis. (A-248, 249, 250, 251)

It may fairly be said that the constitutional issues in the case were as fully raised in the trial court as in *Berger* v. *New York,* No. 615. No further evidence is necessary on that point; nor could any additional useful evidence be developed upon a new trial. This record is as complete on the constitutional issue as it will ever be. See *Mills* v. *Alabama,* 384 U.S. 214 (1966).

2. The New York Court of Appeals at Least Impliedly Sustained the Constitutionality of the Statute

In its ruling, the Court of Appeals wrote:

> "Recording of conversations made pursuant to judicial orders authorizing eavesdropping under section 813-a of the Code of Criminal Procedure are not such property 'unlawfully obtained' . . ."

Implicit in this is a finding that such recordings were lawfully obtained, as, indeed, the same court held the same day in *Berger* v. *People,* 18 N.Y. 2d 638 (1966), certiorari granted, No. 615, December 6, 1966.

3. The Convictions Are Final

Neither of the New York appellate courts remanded this case for a new trial. If nothing further is done, the sentences will automatically be carried out. The fact that the state appellate courts authorized the withdrawal of guilty pleas does not make the pending convictions and sentences a nullity.

For the foregoing reasons, the appellants respectfully ask that the Motion to Dismiss be denied and probable jurisdiction noted.

EDWARD BENNETT WILLIAMS
RAYMOND W. BERGAN
1000 Hill Building
Washington, D. C. 20006

HENRY MAYER
19 West 44th Street
New York, New York 10036

Counsel for Appellants
Habel, McGovern and
Rodriguez

Of Counsel:

WILLIAMS & CONNOLLY
1000 Hill Building
Washington, D. C. 20006

MAYER, WEINER & MAYER
19 West 44th Street
New York, New York 10036

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966.

BURKARD ET AL. *v.* NEW YORK; and
HABEL ET AL. *v.* NEW YORK.

APPEALS FROM THE COURT OF APPEALS OF NEW YORK.

Nos. 807 and 808. Decided June 12, 1967.

PER CURIAM.

The motion to dismiss is granted and the appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.